

**United States Department of Labor
Employees' Compensation Appeals Board**

R.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Pittsburgh, PA, Employer**

)
)
)
)
)
)
)
)

**Docket No. 10-1693
Issued: April 8, 2011**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On June 10, 2010 appellant filed a timely appeal from a December 17, 2009 decision of the Office of Workers' Compensation Programs denying his request for further review of the merits of his claim. Pursuant to the Federal Employees' Compensation Act and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the nonmerit decision by the Office. The last merit decision of record was the Office's December 16, 2008 decision. Because more than 180 days has elapsed between the last merit decision and the filing of this appeal on June 10, 2010, the Board lacks jurisdiction to review the merits of this case.¹

¹ For decisions issued prior to November 19, 2008, a claimant had up to one year to file an appeal. An appeal of Office decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e).

ISSUE

The issue is whether the Office properly denied appellant's request for further review of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On September 5, 2008 appellant, then a 49-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that he developed thoracolumbar sprain/strain and aggravation of underlying thoracic degenerative disc disease T6-7. He failed to explain in factual terms how his employment caused his alleged occupational disease. Appellant first became aware of his illness on March 22, 2006 and realized he had an employment-related condition on August 30, 2008. On the reverse side of the form, the employing establishment indicated that he first reported his condition to his supervisor on September 1, 2008. Appellant stopped work on April 8, 2008.²

Appellant submitted a March 22, 2006 Office decision which held that his claim had been expanded to cover aggravation of thoracic degenerative disc disease T6-7 for File No. xxxxxx939.

In medical reports dated August 22, 2007 to April 9, 2008, Dr. Michael P. Casey, a Board-certified orthopedic surgeon, diagnosed appellant with thoracic sprain and degenerative disc disease. On August 22, 2007 he recommended appellant be placed on light duty, should not carry or lift more than 25 pounds, and must be able to stand as necessary during the workday. On April 9, 2008 Dr. Casey recommended appellant return to regular duty with no work limitations.

By letter dated August 3, 2009, the Office requested additional factual information from both appellant and the employing establishment. It also requested medical documentation pertaining to any treatment appellant had received for his back injury.

In an October 22, 2008 medical report, Dr. Paul Lieber, Board-certified in physical medicine and rehabilitation, reported that he first evaluated appellant on April 14, 2008 and diagnosed thoracolumbar strain/sprain and aggravation of underlying degenerative disc disease.

² The Board notes appellant has additional compensation claims which are distinct from this claim currently on appeal but have some relevance to factual matters. This is because the claims involve the same body parts and were being developed during a period close to this occupational disease claim. The following claims are not before the Board. Appellant had a prior traumatic injury on February 22, 2003 when he fell five feet when porch stairs failed. The claim was accepted for lumbar strain and thoracic strain, File No. xxxxxx842. Appellant also injured himself on December 15, 2003 while delivering mail on that date in the performance of duty. The claim was accepted for lumbar strain and thoracic strain, File No. xxxxxx939. Appellant was on modified duty and returned to full duty on January 13, 2004. The two claims have since been combined, File No. xxxxxx939.

On March 13, 2004 appellant stopped work due to a recurrence of a disability, File No. xxxxxx939.

On April 11, 2008 appellant filed a recurrence of disability alleging that he hurt his back when he had to carry mail on route which was too heavy. He stated that the recurrence was related to his December 15, 2003 injury and occurred on April 7, 2008, File No. xxxxxx002.

He noted that appellant underwent a magnetic resonance imaging (MRI) scan which revealed a left L5-S1 degenerative disc, foraminal narrowing at L5-S1 on the right and pseudoarthrosis forming between the lateral mass and right lateral body of T7. Dr. Lieber also stated that appellant's symptoms of back and leg pain reoccur with increased activity and the demands of regular-duty work. He noted that the heavier weights required of appellant's job exacerbated his degenerative disc diseases. Dr. Lieber opined that appellant's condition was permanent and recommended he be limited to full-time light-duty work, lifting and carrying no more than 20 pounds.

On October 26, 2008 appellant submitted a position description outlining the duties and requirements of a U.S. Postal Service letter carrier.

In a November 5, 2008 factual statement, appellant reported that lifting and carrying mail at work contributed to his lumbar condition. He stated that he would lift and carry mail for approximately five to six hours a day, intermittently.

Appellant also submitted copies of documents from his previous claims. He provided an April 11, 2008 notice of recurrence form, August 2, 2005 and February 24, 2006 medical reports from Dr. David Neuschwander, and an October 22, 2008 Office decision for File No. xxxxxx939 which held that the third-party surplus should be absorbed by the compensation payment under File No. xxxxxx842.

By decision dated December 16, 2008, the Office denied appellant's claim finding that he did not establish fact of injury.

On December 11, 2009 appellant requested reconsideration of the Office decision. In a February 10, 2009 statement, he noted that he never reported to work and the postal service eliminated his job. Appellant stated that his supervisor sent him home and did not provide him with any type of work, including light or limited duty. He also alleged that his disability was caused by management.

Appellant submitted articles about the recurrence of disability and workers' compensation, an April 19 and 28, 2008 postal service request for notification of absence, a May 2, 2008 pay stub, a February 9, 2009 postal service employee everything report, a November 8, 2008 postal service notice of vacancy posting, and a August 19, 2009 time analysis form for File No. xxxxxx939.

By letter dated February 12, 2009, the employing establishment informed appellant that even without verification of an open claim, his limitations would qualify him for light duty or reasonable accommodations. The employing establishment attached the necessary request forms.

In a March 6, 2009 medical report, Dr. Lieber stated that he had been treating appellant since February 22, 2003 when he fell approximately five feet and was diagnosed with lumbar and thoracic strains. He noted that appellant was released to full-duty unrestricted work on April 7, 2008. Upon returning to work, Dr. Lieber opined that appellant had a recurrence of his work-related injury from February 22, 2003, reinjuring his mid and lower back. He stated that

appellant's injury was a result of returning to work on April 7, 2008. Dr. Lieber opined it represented an aggravation of a preexisting condition and should be considered a new injury.

By letter dated July 29, 2009, the employing establishment informed appellant that he was provided with an employment offer on May 26, 2009 but chose to take voluntary early retirement instead, which went into effect on July 31, 2009.

By decision dated December 17, 2009, the Office denied appellant's request for reconsideration finding that he neither raised substantive legal questions nor included new and relevant evidence.

LEGAL PRECEDENT

The Office's December 16, 2008 merit decision denied appellant's claim based on his failure to establish fact of occupational exposure and a causal connection to his employment. On reconsideration, appellant must submit relevant evidence or advance legal contentions not previously considered on this particular issue.³ To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.⁴

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical evidence.⁵ Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee. This medical opinion must include an accurate history of the employee's employment injury, and must explain how the condition is related to the injury. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.⁶

³ *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

⁴ *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁵ *D.U.*, Docket No. 10-144 (issued July 27, 2010).

⁶ *James Mack*, 43 ECAB 321 (1991).

To require the Office to reopen a case for merit review under section 8128(a), the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.⁷ Section 10.608(b) of Office regulations provide that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.⁸

ANALYSIS

The Board finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

The only Office decision before the Board on appeal is the December 17, 2009 decision, denying appellant's application for review. Because more than 180 days elapsed between the date of the Office's most recent merit decision on December 16, 2008 and the filing of appellant's appeal on June 10, 2010, the Board lacks jurisdiction to review the merits of appellant's claim.⁹

Appellant submitted a March 6, 2009 medical report from Dr. Lieber diagnosing him with lumbar and thoracic strains. Dr. Lieber opined that the injury was an aggravation of his preexisting condition from his work-related injury of February 22, 2003. He noted that appellant's injury was aggravated when appellant returned to work on April 7, 2008. While this evidence is new, the Board finds that it is not relevant to the issue of fact of injury. Dr. Lieber did not establish what employment activities caused his injury. This evidence is not material or relevant because the denial of appellant's claim was based on his failure to factually establish the claimed occupational exposure to a condition which caused the medical injury or disease. To require the Office to reopen a case for reconsideration, appellant must submit relevant evidence not previously of record or advance legal contentions not previously considered.¹⁰ The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.¹¹

Appellant's February 10, 2009 statement alleged that his supervisor did not provide him with any type of work including light or limited duty. He noted that he never reported to work and the postal service eliminated his job. This statement, however, does not establish that

⁷ *D.K.*, 59 ECAB 141 (2007).

⁸ *K.H.*, 59 ECAB 495 (2008).

⁹ 20 C.F.R. § 501.3(e) requires that an application for review by the Board be filed within 180 days of the date of the Office's final decision being appealed.

¹⁰ *E.g.*, *Eladio Joel Abrera*, 28 ECAB 401 (1977); *Edward Matthew Diekemper*, 31 ECAB 224 (1979); *Ethel D. Curry*, 35 ECAB 737 (1984); *Helen E. Tschantz*, 39 ECAB 1382 (1988).

¹¹ *Jimmy O. Gilmore*, 37 ECAB 257 (1985).

appellant engaged in the employment activities that caused his thoracic lumbar and spinal condition.

The remaining evidence of record also fails to support appellant's allegation that he sustained a back injury causally related to his employment factors. Appellant submitted letters from the employing establishment which advised him that he could apply for light duty and that he was electing early retirement. He also submitted worker's compensation articles, postal service requests for notification of absence, a May 2, 2008 pay stub, a February 9, 2009 postal service employee everything report, a postal service notice of vacancy posting, and a August 19, 2009 time analysis form for File No. xxxxxx939. While these documents have some connection to appellant's employment, they are not relevant to the issue for which the Office denied appellant's claim, the failure to establish his claimed occupational exposure. Therefore, these documents do not constitute a basis for reopening appellant's claim.¹²

Consequently, the evidence does not support appellant's allegation that he sustained a back injury causally related to factors of his employment. Thus, appellant has not established that the Office abused its discretion in its December 17, 2009 decision under section 8128(a) of the Act because he did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office, or submit relevant and pertinent new evidence not previously considered by the Office.¹³

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of his claim pursuant to 5 U.S.C. § 8128(a).

¹² *David J. McDonald*, 50 ECAB 185 (1990).

¹³ *Sherry A. Hunt*, 49 ECAB 467 (1998).

ORDER

IT IS HEREBY ORDERED THAT the December 17, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 8, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board